

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

77-4028

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P/S

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 77-4028, 77-4047

ITT WORLD COMMUNICATIONS INC. and
RCA GLOBAL COMMUNICATIONS, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSSION and
UNITED STATES OF AMERICA

Respondents,

GRAPHNET SYSTEMS, INC.,
TELENET COMMUNICATIONS COPRORATION, et al.,

Intervenors.

On Petitions for Review of Orders
Of The Federal Communications Commission

BRIEF FOR INTERVENORS
GRAPHNET SYSTEMS, INC. and
TELENET COMMUNICATIONS CORPORATION

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TABLE OF CONTENTS

QUESTION PRESENTED	2
COUNTERSTATEMENT OF THE CASE	2
The Telenet Proposal	2
The Graphnet Proposal	6
IRC Opposition	7
The Commission's Orders	9
ARGUMENT	13
A. The Commission's Orders Are Consistent With Its Statutory Mandate	13
B. The Commission Was Not Required To Defer Action Upon These Applications Pending The Outcome Of Its "Expanded Gateway" Proceedings In Docket No. 19660	17
C. The Commission Was Not Required to Impose "Gateway" Restrictions Upon Telenet And Graphnet, Or To Forbid Their "Interconnection" Of Domestic And International Services	19
D. The Commission's Obligation To Regulate In the Public Interest Does Not Compel It To "Handicap" Potential Competitors, And Its Refusal To Do So Here Was A Proper Exercise Of Its Authority	22
E. Section 222 Of The Act Does Not Bar The Telenet and Graphnet Authorizations	23
CONCLUSION	28

TABLE OF AUTHORITIESCases

	<u>Page</u>
<u>American Airlines, Inc. v. C.A.B.,</u> 359 F2d 624 (D.C. Cir., 1966)	15,17
<u>FCC v. Pottsville Broadcasting Co.,</u> 309 U.S. 134 (1940)	19
<u>FCC v. Schreiber,</u> 381 U.S. 279 (1965)	19
<u>Gross v. FCC,</u> 480 F2d 1288 (2nd Cir., 1973)	25
<u>Nader v. FCC,</u> 550 F2d 182 (D.C. Cir., 1975)	15
<u>National Association of Regulatory Utility</u> <u>Commissioners v. FCC,</u> 525 F2d 630 (D.C. Cir., 1976)	15
<u>M.B.C. v. United States,</u> 319 U.S. 190 (1943)	15
<u>RCA Global Communications, Inc. v. FCC,</u> 574 F2d 727 (2nd Cir., 1978)	15
<u>Unemployment Compensation Commission v. Aragon,</u> 329 U.S. 147 (1946)	25

Agency Decisions

<u>American Satellite Corp.,</u> 43 FCC2d 348 (1973)	22,27
<u>Authorized User,</u> 4 FCC2d 421 (1966)	8
<u>Domestic Communications Satellite Facilities</u> 34 FCC2d 1 (1972)	22
<u>Graphnet Systems, Inc.,</u> 44 FCC2d 300 (1974)	6

	<u>Page</u>
<u>Graphnet Systems, Inc.,</u> 61 FCC2d 685 (1976)	6
<u>International Record Carriers Communications,</u> 54 FCC2d 909 (1975)	20
<u>Overseas Dataphone Service,</u> 57 FCC2d 705 (1976)	13,14
<u>RCA Global Communications, Inc.,</u> 42 FCC2d 774 (1973)	22,25
<u>Telenet Communications Corp.,</u> 46 FCC2d 680 (1974)	4

Statutes

47 U.S.C. § 151	13
47 U.S.C. § 154	19
47 U.S.C. § 222	passim
47 U.S.C. § 402	18
47 U.S.C. § 405	24,25,27
47 U.S.C. § 701	17

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BRIEF OF INTERVENORS
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The petitions of ITT World Communications, Inc., and RCA Global Communications, Inc., seek reversal of orders of the Federal Communications Commission conditionally granting applications of Intervenor Graphnet Systems, Inc., and Telenet Communications Corporation to extend their respective domestic facsimile and data communications networks overseas to certain European countries, on a "developmental" basis.

QUESTION PRESENTED

Whether the Commission's grants to Graphnet and Telenet, as conditioned, are consistent with the Communications Act of 1934, as amended, and otherwise represent reasoned decision-making.

COUNTERSTATEMENT OF THE CASE

ITT and RCA are here appealing from Orders of the Commission which, inter alia, granted applications of Graphnet and Telenet to extend their respective domestic United States communications services to several Western European countries. Graphnet and Telenet are two of a small group of communications common carriers which has been characterized as "value-added" or "resale" common carriers; such carriers typically lease their underlying transmission capacity from facilities carriers -- predominantly AT&T -- and, through the use of computer techniques, offer an enhanced communications service to the public.

The Telenet Proposal

Telenet was formed in 1972 for the purpose of making available to industry, government, and the educational community a new and highly sophisticated form of data

communications technology -- termed "packet switching"^{1/} -- which had been developed by its parent company under contract to the Advanced Research Projects Agency, or ARPA, of the U.S. Department of Defense.^{2/} While there are a number of advantages perceived by the user in packet-switching technology, two of the principal benefits are the high degree of error-free performance, and the much greater efficiency in use of the underlying transmission facilities which can be achieved.

1/ "Packet switching" permits the rapid and efficient error-free transmission of data among remote-access data processing computers and computer terminals. To illustrate: Telenet's packet-switching network consists of numerous high-speed data communication lines, which it leases from AT&T, inter-connecting small computers located in Telenet switching offices in over eighty cities throughout the continental United States. These computers receive data traffic over leased and dial telephone lines from Telenet customers and break down each data message entering the network into "packets" having up to 128 characters each. Each packet is then separately addressed and routed through the network over the most expeditious path existing at that particular moment, as determined by these computers, to the destination Telenet office. At the destination office, the packets are reassembled into the complete message and delivered to the customer's computer or terminal.

Although the process is complex, the typical data packet passes through the network from origin to destination in less than 1/5 of a second. Each switching computer performs many valuable ancillary tasks as well. Thus, the network detects and corrects errors occurring in transmission, provides code and speed conversion to enable otherwise incompatible computers and terminals to communicate with one another, and provides for simple editing of data typed by a user of a keyboard terminal.

2/ Telenet's founder was Bolt Beranek and Newman Inc., an acknowledged world leader in the field of computer research and technology.

Because of the efficiency of line utilization which results from packet-switching, the interactive data communications user finds it considerably more economical to utilize Telenet's service than a conventional dedicated private line for most applications.

Telenet was initially authorized by the FCC to offer a public packet-switched data communications network service within the Continental United States in April 1974 (46 FCC2d 680), and it instituted that service in August 1975. In May 1976, Telenet applied to the FCC for authority to offer this service internationally, initially to Europe in conjunction with the British Post Office. (J.A. 79-132). In its application, Telenet pointed out that a number of foreign countries, specifically including the United Kingdom, France, Spain, and Japan, have built, or are building, domestic packet-switched data networks. The leading international telecommunications standards organization, the CCITT, has specifically recognized several classes of packet-switched international services, and has established protocols which will facilitate the interconnection of the domestic packet-switched networks on an international basis.

Telenet's international application was supported by numerous data communications users. For example, the American Express Company wrote to the Commission as follows:

"Because of our significant business interests overseas, including the United Kingdom and Europe, we believe that the international packet-switching network connection proposed by Telenet could be of substantial benefit to American Express. This would enable time-sharing users in Europe to utilize the same computers as those in the United States at costs far less than conventional communications now permit." (J.A. 840).

Other users pointed out that the communications cost of currently available international services was prohibitive for most interactive data communications purposes; that unique data bases located within computers in the United States would, for the first time, be economically available to users abroad; that multi-national educational and research projects utilizing specialized computer programs would be substantially strengthened; and that existing tariff structures for transatlantic communications services discourage multi-national corporations and U.S. companies with overseas affiliations from exchanging digital data, particularly for low and medium traffic customers. (J.A. 174-187, 838-841).

Shortly before filing its application with the FCC, but after a period of extensive negotiations, Telenet had reached an informal understanding with the British Post Office, which is the sole purveyor of common carrier communications services in, to, and from the United Kingdom. (J.A. 130-131). This informal understanding contemplated the provision of an international packet-switching service at a cost to the user of

approximately \$10 per hour for communications between an interactive data terminal and a computer. This would have represented an enormous saving for data communications users, for the cost of then-existing circuit-switched services between the U.S. and the U.K. ranged between approximately \$100 and \$240 per hour, and a leased channel cost approximately \$10,000 per month. Such existing services utilized extremely inefficient technology and were priced far above the ability of most potential users to pay; and consequently, the proposed Telenet/BPO service was the first real attempt to meet the market demand for transatlantic interactive data communications.

The Graphnet Proposal

Graphnet was first certificated as a common carrier by the FCC in January 1974, Graphnet Systems, Inc., 44 FCC2d 800 (1974), and commenced operations one year later. Authorized to establish a nationwide packet-switched communications network, Graphnet's initial offerings permitted communications between otherwise-incompatible terminal devices. For the first time, users were enabled, among other things, to initiate a communication from such devices as data terminals, teletype-writers and computers, and have those communications received on distant facsimile machines.^{3/}

^{3/} In November 1976, Graphnet's carrier authority was enlarged to include a variety of additional services. Graphnet Systems, Inc., 61 FCC2d 685 (1976).

In February 1976, Graphnet applied for FCC authority to extend its service to eleven Western European countries -- Belgium, Denmark, France, Italy, The Netherlands, Norway, Spain, Sweden, Switzerland, The United Kingdom and West Germany. As the Commission summarized it below (J.A. 3):

"Graphnet's proposal would permit its subscribers in the United States to input information from virtually any terminal source and, through interconnection with foreign networks, output that information on receiving facsimile terminal devices located in any one of the European countries [specified]."

IRC Opposition

The four major International Record Carriers ("IRCs")^{4/} vigorously opposed the Graphnet and Telenet applications. Initially, the IRCs urged that the applications be dismissed outright without consideration of their merits, in view of the absence of formal operating agreements between the applicants and correspondent telecommunications entities in the foreign countries involved. (J.A. 137-45; 148-49; 160-62, 198-99, 209-10, 214-15, 221-23, 230). In addition, they presented a variety of arguments why entry by Graphnet and Telenet into the international communications marketplace would be contrary to the public interest. These included:

(a) the claim that Graphnet and Telenet would have an unfair advantage over the existing International Record Carriers, since they would be afforded the opportunity to

^{4/} Two of these -- ITT and RCA -- are petitioners here, and the other two -- WUI and TRT -- are Intervenor.

cross-subsidize international services with their domestic network profits;

(b) the claim that the existing international services were adequate;

(c) the claim that the existing international carriers were fully capable of offering innovative services when the time was right, but that the Graphnet and Telenet applications were "premature";^{5/}

(d) the claim that Graphnet and Telenet were not legally qualified to lease satellite circuits from Comsat, under the FCC's Authorized User decision, 4 FCC2d 421 (1966), wherein the Commission considered the question of the extent to which the Communications Satellite Act of 1962 (47 U.S.C. §701-744) permits Comsat to provide service directly to entities other than carriers; and

(e) The claim (as to Telenet) that its proposed use of a network switching center in Boston as an interface to its international service was contrary to the Commission's "gateway" policies.

^{5/} During the pendency of these petitions, one of these carriers -- Western Union International, Inc. ("WUI") -- sought to tariff a "Database Service", proposed to be somewhat similar to, although less sophisticated than, Telenet's packet-switched data service, and at tariff rates approximately twice those proposed in Telenet's application. When the Commission ruled that WUI must seek formal Section 214 authority, WUI filed such an application in November 1976 (J.A. 507-14). Objections to that application were filed by several parties, including Graphnet and Telenet, in the last week of December, and the WUI application was granted the following week, in the same Order which is here on review.

The Commission's Orders

On January 4, 1977, the FCC adopted a single Order (J.A. 1-13; hereinafter "1977 Order") granting four applications for new international services, those of Graphnet, Telenet, and WUI, as well as an RCA application for an enhanced data service between the U.S. and the Netherlands.

In its January 1977 Order, the FCC noted "a fast-growing need for overseas data communications services which is not presently being met by existing carrier service offerings." (J.A. 3). It recited the inadequacies of the existing offerings^{6/} in terms of cost inefficiency and technical incompatibility:

"In many instances it is not feasible for a data communications user desiring access to an overseas terminal or computer to use the existing services of the international record carriers. Since data communications tend to be intermittent and last for very short periods of time only very high volume users will find it cost efficient to interconnect overseas locations using alternate voice/data circuits. The use of Datel or Telex is also inefficient for many data communications users since each time a terminal or computer is accessed a separate call must be placed over the Datel or Telex network. This defeats the advantages inherent in high speed transaction-oriented data processing which potential users of the communications services seek. Moreover, the existing overseas data communications services generally do not in themselves make possible communications between incompatible terminals or computers." (J.A. 5).

^{6/} The existing services usable for data transmission offered by the "international record carriers are alternate voice/data or private lines, Datel service [a switched message and facsimile service which uses voice for cuing, and which may be manually interconnected with the domestic telephone or telegraph network] and Telex service." (J.A. 4, footnote omitted).

Thus, the Commission concluded, "In view of the technical and economic deficiencies of existing services relative to the public need, we find that the public interest requires more and better service." (J.A. 5). And in trying to create an environment in which it could "determine how this service can best be provided", it found that the Graphnet and Telenet proposals represented effective vehicles for making such a determination:

"Graphnet would extend its existing network so that using its store-and-forward techniques subscribers located in the United States would be permitted access on a dial-up basis to facsimile devices at addressee locations in other nations whether or not the facsimile devices are compatible with the subscriber's input device. Using packet-switching techniques, Telenet would achieve highly efficient use of its overseas circuits by inter-mixing individual customers' data on the circuit in packet form. The efficient use of the overseas circuit would permit small volume intermittent users access to overseas terminals or computers in a cost-efficient manner for real-time or conversational interaction between terminals. The Telenet network would perform speed and code conversion so that data communication between normally incompatible terminal devices or computers would be possible." (Ibid).

The Commission rejected RCA's contention that Graphnet and Telenet should be compelled to form separate corporate entities to provide international services, noting that

"[e]ach is a small entity involved only in specialized competitive services and each would have no significant revenue base in one market by which it might obtain an advantage over existing or new entities in another market." (J.A. 7).

However, the Commission imposed a requirement that Graphnet and Telenet report quarterly "all costs and revenues involved in their domestic offerings segregated from the costs and revenues involved in their overseas offerings" (J.A. 10), "so that the Commission has appropriate data which it can use to determine whether the suggested corporate arrangements would better serve the public interest." (J.A. 7).

RCA's claim that it and the other international carriers would suffer a competitive disadvantage vis-a-vis Graphnet and Telenet was also rejected, the Commission observing that RCA had failed to identify or provide probative evidence to support its allegations; that the existing carriers are free to interconnect with a variety of domestic carriers; and that they have "inherent advantages over Graphnet and Telenet by reason of their established standing in the international field." (J.A. 8).

Dealing with the suggestion of ITT that the "gateway" provisions of Section 222 of the Communications Act (47 U.S.C. §202) barred Telenet's proposal to interconnect one of its two planned satellite circuits to its domestic network through its Boston switching center, the Commission ruled that Telenet was not by definition an "international telegraph carrier" to which the "gateway" provisions of Section 222(a)(5) of the Act applied, and that in any event, "it would be an unreasonable burden on Telenet to require it at this time to establish a special

switching center in one of the presently authorized gateway cities to provide its services pending the outcome of that proceeding [in Docket 19660 concerning the expansion of authorized gateway cities]. We do, however, retain jurisdiction over this matter." (J.A. 8-9).

The Commission's grant of the Graphnet and Telenet applications was specifically conditioned upon each entity submitting to the Commission its operating agreements with appropriate foreign entities, and upon the Commission's approval of such agreements prior to the commencement of service. (J.A. 7, 11).^{7/}

On February 10, 1977, RCA petitioned the Commission to reconsider its grant of the Graphnet and Telenet applications (J.A. 669-686), claiming that the Commission's January 1977 Order had failed to address "substantial public interest issues". By its Memorandum Opinion and Order released April 3, 1978 (J.A. 20-44A; hereinafter "1978 Order"), the Commission denied RCA's petition, dealing extensively with each of the arguments raised by RCA, and reaffirming its original determinations that the public need for innovative overseas data communications services can best be met by authorizing the entry of Graphnet and Telenet into the international marketplace.

^{7/} At this time, neither Graphnet nor Telenet has reached an operating agreement with an appropriate foreign entity, and thus this condition has yet to be fulfilled.

ARGUMENT

A. The Commission's Orders
Are Consistent With Its
Statutory Mandate

Section 1 of the Communications Act of 1934, as amended (47 USC §151), established the Commission

"so as to make available, so far as possible to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ."

The Orders below were fully consistent with this statutory mandate.

The applications of Telenet and Graphnet presented the Commission with the opportunity to transfer to the international sector communications technologies which had been proven domestically, to enable "rapid, efficient . . . service . . . at reasonable charges." The Commission was not unaware of the need for improved international data services, having recently considered the needs of the international data communications marketplace in determining to permit AT&T and the established international carriers to seek authorizations to offer data-phone service^{8/} internationally: Overseas Dataphone Service,

^{8/} "Dataphone" service, offered domestically by AT&T since 1962, is a far cry from the "state-of-the-art" technologies reflected in the Telenet and Graphnet proposals. Consisting merely of the use of a dataset connected to a conventional dial-up voice telephone circuit, dataphone has no error control, has no ability to bridge incompatibility problems, and - because of overseas telephone charges - is more expensive by a factor of 20 than the packet-switched service proposed by Telenet.

57 FCC2d 705 (1976), ^{9/}affirmed sub nom. ITT World Communications, Inc. v. FCC, 555 F2d 1125 (2d Cir., 1977).

As well as confirming the general need for more flexible data communications services found by the Commission in the Overseas Dataphone proceeding, the Telenet and Graphnet applications particularized the needs for their unique services. Telenet's application was supported by a number of its domestic customers who described the inadequacies of current overseas services for meeting the needs of the interactive data communications users. (J.A. 174-187, 383-841).

Despite this factual support for these new services, the Commission qualified its approval of the Telenet and Graphnet applications, granting them on a "developmental" basis: In order to acquire actual data concerning the emerging markets, the Commission imposed detailed reporting requirements upon each of the carriers as to its newly-authorized service.

Thus, the Commission's action was carefully tailored to the particular circumstances before it. Faced on the one hand with the apparent demand for new international services as evidenced by the Telenet and Graphnet applications (and by the support of prospective customers for the proposed new

^{9/} Among the factors considered by the Commission in Overseas Dataphone were the projected growth of facsimile terminals from 52,000 in 1972 to 290,000 by 1980, and of data terminals from 600,000 in 1970 to 8,000,000 in 1985; and that international leased data circuits were expected to grow at an annual rate of 21% during the 1975-1980 period. (57 FCC2d at 706-7).

services), and on the other with vague and unsupported claims of economic harm by the established international carriers,^{10/} the Commission wisely chose to discover the facts pragmatically, rather than hypothetically, by authorizing the new services on a "developmental" basis; by requiring quarterly reports of traffic and revenues; and by retaining jurisdiction over these matters.^{11/} To have done otherwise would have subordinated the public's interest in having available "rapid, efficient . . . communication service . . . at reasonable charges . . ." to the private interests of the established record carriers.

Rather than the product of caprice and arbitrariness (as claimed by Petitioners), the Commission's action here was a carefully crafted attempt to obtain a better feel for the international data and facsimile communications marketplace in the most reliable possible way -- through actual experience. Its Orders fall well within the bounds of its "broad discretion": See National Association of Regulatory Utility Commissioners v. F.C.C., 525 F2d 630 (D.C. Cir., 1976), cert. denied 425 U.S. 992 (1976); N.B.C. v. United States, 319 U.S. 190 (1943); Nader v. F.C.C., 550 F2d 182 (D.C. Cir., 1975).

^{10/} Such claims are commonplace before the Commission, and even before this Court: See RCA Global Communications, Inc. v. FCC, 574 F2d 727, at 729 (2d Cir., 1978), where the Court characterized RCA's objection as "bordering on in terrorem."

^{11/} Implicitly, the Commission's action reflects the view (consistent with Judge Leventhal's statement, in a similar context) that the established carriers' claims of economic impact raised "the kind of issue where a month of experience will be worth a year of hearings." American Airlines, Inc. v. C.A.B., 359 F2d 624, 633 (D.C. Cir.); cert. denied, 385 U.S. 843 (1966).

RCA contends (Brief, pp. 41-42) that the Commission "ignored" alternative means by which these needs might be met, claiming that RCA was "on line in 1977 with its Remote Global Computer Access Service", a service by which RCA interconnects with Telenet and other domestic data carriers for overseas service. To the contrary, the Commission did not ignore the possibility of providing similar services through inter-connection arrangements: In fact, in the very Order under review, it granted one such application, that of WUI for its "Database Service".^{12/}

Implicit in RCA's contention is that, by virtue of their status, the IRCs represent the exclusive vehicles through which new technology may be introduced into international communications. The fact that both ITT and RCA have challenged only the Telenet and Graphnet applications while acquiescing in the concurrent grant of WUI's comparable Database Service application further supports the view that their underlying concern is that the field of international communications remains their exclusive domain. Nothing in the Communications

^{12/} Database Service (DBS), RCA's Remote Global Computer Access Service (RGCAS), ITT's Universal Data Transfer Service (UDTS), and TRT's DATAPAK service are essentially identical services: Each IRC and its foreign correspondent leases the necessary computer hardware and software from Telenet and Tymnet (another domestic data carrier) for installation at the IRC and overseas premises, thereby enabling the IRCs, through interconnecting with the domestic Telenet and Tymnet networks, to offer a packet-switched or similar service. None of these services was even proposed at the time of Telenet's application, and it is reasonable to conclude that they would not exist today but for the stimulative effect of that application.

Act or in Commission precedent supports their view of the market structure. To the contrary, the Communications Satellite Act of 1962 expressly requires that the Commission "ensure that all present and future authorized carriers shall have nondiscriminatory use of and equitable access to, the Communications Satellite System . . ." (47 U.S.C. §701(c); emphasis added).

Stripped to its essentials, RCA's case is that the Commission was obliged to defer action upon the Graphnet and Telenet applications while the IRCs educated themselves concerning the capabilities of new technologies, and to then deny Graphnet and Telenet on the basis that the IRCs were capable of meeting the need for innovative services. No Court would have sustained such high-handedness, and the Commission wisely acted as -- and when -- it did.^{13/}

B. The Commission Was Not Required To Defer Action Upon These Applications Pending The Outcome Of Its "Expanded Gateway" Proceedings in Docket No. 19660

Petitioners ITT and RCA contend that it was unfair of the Commission to authorize Graphnet and Telenet to provide both domestic and international services through a single entity,

^{13/} A slightly more subtle procedural suggestion to the same substantive end -- the deferral of these applications while a broad inquiry into the nature of the overseas data communications marketplace is conducted -- was made by RCA (J.A. 268), and rejected the Commission (J.A. 36), citing American Airlines, Inc. v. C.A.B., Note 11, supra.

while the existing international record carriers are limited to their gateways; while they have pending earlier-filed applications to expand their gateways; and while they are precluded from interconnecting their domestic affiliates with their international operations.

ITT and RCA are pleading their cases in the wrong forum. If the Commission has unlawfully denied or delayed action upon Petitioners' expanded gateway applications, their remedy is to seek judicial relief from those actions. If the Commission has imposed unlawful conditions on the authorizations of the domestic affiliates of ITT and RCA, Section 402(a) of the Act (47 U.S.C. §402(a)) offers them a direct judicial remedy. In fact, neither carrier has sought judicial review of those actions, which accordingly must be accepted as valid and lawful actions of the Commission, which are not subject to indirect review under the guise of these appeals from the unrelated authorizations of of Telenet and Graphnet.^{14/}

Moreover, to give effect to Petitioners' concepts of "fairness" would work an impossible administrative burden upon the Commission, which, because of the volume of applications

^{14/} Since the filing of Petitioners' briefs herein, the Commission has taken further action on each of these matters. In Docket No. 19660 (the expanded gateway" proceeding), it has required the IPCs to update their applications, inter alia, to show projected costs and revenue division from Western Union's domestic telegraph business, and in separate actions, it has rejected renewed requests by ITT and RCA for authority to interconnect with their respective domestic affiliates. Copies of these Orders are attached as Appendices A-C to Respondents' Brief.

before it, and the wide range of issues of varying complexity which they represent, cannot possibly be expected to adhere to a "first-in, first-out" principle.^{15/} Section 4(j) of the Communications Act (47 U.S.C. §154(j)) authorizes the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice," and the Courts have recognized that this grant of authority allows the Commission flexibility to devise procedures to meet the exigencies of a particular situation.^{16/}

C. The Commission Was Not Required To Impose "Gateway" Restrictions Upon Telenet And Graphnet, Or To Forbid Their "Interconnection" Of Domestic And International Services

Petitioners ITT and RCA argue, as a corollary to the preceding point, that it was arbitrary for the Commission to refuse to apply its "gateway" policies to Telenet and Graphnet, or to impose upon these entities the same "non-interconnection" conditions which it has imposed upon the domestic affiliates of the Petitioners.

^{15/} By Petitioners' standards, was it "fair" for the Commission to consolidate for action in its January 1977 Order the application of Telenet, filed in May 1976, with that of WUI, filed six months later, and proposing a functionally similar service?

^{16/} See, e.g., FCC v. Schreiber, 381 U.S. 279 (1965); FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

The Commission fully dealt with this contention below, noting that Telenet and Graphnet were not "international telegraph carriers" within the meaning of Section 222(a)(6), and did not, upon grant of their applications, automatically become international telegraph carriers. Thus, to the extent that Section 222 (a)(5) restricts international telegraph carriers to "gateways", it has no applicability to Telenet and Graphnet (J.A. 8).

ITT, in particular, goes to great lengths to argue (Brief, pp. 32-40) that the Commission improperly interpreted Section 222 as prohibiting it from authorizing the existing international carriers to operate domestically beyond their gateways. This is a totally irrelevant and misdirected argument, in that:

(a) the Commission did not -- as claimed by ITT -- interpret Section 222 "as a statutory bar" to domestic expansion by the IRCs, but referred to its provisions merely as "restrictions which Congress imposed on the international record carriers;"^{17/}

(b) Assuming, arguendo, that ITT is correct that Section 222 does not bar the international carriers from operating domestically (a position with which, as noted infra, Intervenor TRT, another international carrier, strongly disagrees), such interpretation would provide no warrant for denying or limiting

^{17/} Section 222(a)(5) did not identify any "gateways", and left it to the Commission to authorize gateways as it found them to be justified -- which it has done; see International Record Carriers Communications, 54 FCC2d 909 (1975).

the authorizations of Telenet and Graphnet: Rather, it might justify the elimination of conditions heretofore placed upon the authorizations of ITT's domestic affiliates, and expansive action by the Commission in Docket No. 19660, matters not before this Court; and

(c) The Commission's reference to Section 222's "restrictions" upon the international telegraph carriers was not a basis for its decision granting the Telenet and Graphnet applications, but was offered only to explain, in response to an RCA argument, that

"... any possible competitive disadvantage which might accrue to the international telegraph carriers in this situation derives not from our actions authorizing Graphnet and Telenet to extend their service offerings, but from restrictions which Congress imposed on the international telegraph carriers."
(J.A. 8).

In an extensive footnote at page 40 of its Brief, ITT sums up with the claim that "the FCC erred when it held that Section 222 denied it authority to permit the IRCs to compete on an equal basis outside the gateway cities." One searches the Orders below in vain for any such "holding". Its absence is hardly surprising, however, since the Commission was not considering any application by an IRC to operate outside its designated gateways. In the same footnote, ITT undertakes a sophistic exercise designed to demonstrate that Telenet and Graphnet should be subject to Section 222, arguing that at such

point as their international revenues exceed their domestic revenues, they will become, by definition, "international telegraph carriers" and be limited to international service to and from the gateways. ITT concludes: "The possibility of such an illogical result further illustrates that the Commission has given Section 222 an implausible reading." ITT has overlooked another possible explanation which would avoid the "illogical result" which it posits; i.e., that Section 222 was never intended to deal with new entrants, such as Telenet and Graphnet, but was designed only to deal with the 1943 market structure, and the impact thereon of the contemplated merger between Western Union and Postal Telegraph.^{18/}

D. The Commission's Obligation To Regulate In The Public Interest Does Not Compel It To "Handicap" Potential Competitors, And Its Refusal To Do So Here Was A Proper Exercise Of Its Authority

Commencing at page 41 of ITT's Brief, and at page 44 of RCA's Brief, the Petitioners argue, in various forms, that the Commission has failed to properly apprehend and deal with the competitive considerations flowing from its refusal to impose "gateway" and non-interconnection requirements upon Telenet and Graphnet. The short answer to these arguments is to be found, surprisingly, in ITT's own Brief, where it concedes, at page

^{18/} See Domestic Communications Satellite Facilities, 34 FCC2d 1, at 49 (1972); RCA Global Communications, Inc., 42 FCC2d 774, at 779 (1973). American Satellite Corp., 43 FCC2d 348 (1973).

41, that "concern for the competitive status of particular carriers is not an appropriate concern for an agency whose determinations must be measured against a 'public interest' standard."

ITT's claim that the Commission's Orders manifest an "apparent belief [by the Commission] that the unequal restrictions which it has placed on the IRCs are necessary to protect the new entrants, Graphnet and Telenet, from the 'inherent advantages' which the IRCs would otherwise have in the competition among the carriers" (Brief, p. 41) is a clear distortion of the Commission's Order. The Commission waived no rules or policies in favor of Telenet or Graphnet, and its refusal to place upon them gateway restrictions which, by a clear reading of Section 222, were inapplicable, can hardly be attributed to favoritism or arbitrariness, nor form the basis for an imputation to the Commission of a desire to protect Graphnet and Telenet from competition.

E. Section 222 Of The Act
Does Not Bar The Telenet
And Graphnet Authorizations

Neither ITT nor RCA contends that the Orders below violate Section 222 of the Communications Act of 1934, as amended. However, Intervenor TRT uniquely urges that Section 222 bars any domestic carrier from engaging in "international telegraph operations", as defined by Section 222(a)(6), and that the

Telenet and Graphnet applications are thus statutorily barred.

At the outset, it should be understood that TRT presents this argument for the first time in this Court. Its Petition to Deny the Telenet application (J.A. 251-2) contained no mention of Section 222, but rested exclusively upon the argument that the absence of an operating agreement between Telenet and the British Post Office rendered the application subject to dismissal or denial.^{19/} TRT did not seek reconsideration of the Commission's January 1977 Order. However, it filed brief supporting Comments with regard to RCA's Petition for Partial Reconsideration (J.A. 698-702), but these were properly dismissed as an untimely petition for reconsideration in the Commission's April 1978 Order (J.A. 21).^{20/} Even in those Comments, TRT referred to Section 222 only in the context of a general policy discussion.

Thus, TRT's arguments are presented here for the first time, and their consideration by this Court is barred by Section 405 of the Communications Act (47 U.S.C. §405), which provides, pertinently:

"The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass."

^{19/} TRT's "Comments" on the Graphnet application (J.A. 230-31) were to the same effect.

^{20/} TRT does not challenge the 1978 Order in this respect.

See Gross v. FCC, 480 F2d 1288, at 1290-91 (2d Cir. 1973). In this regard, Section 405 of the Communications Act codifies the doctrine of exhaustion of administrative remedies:

"A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." Unemployment Compensation Commission v. Aragon, 329 U.S. 143, at 155 (1946).

Thus, the Court should disregard TRT's belated attempt to find a statutory bar to the Telenet and Graphnet authorizations.

In the event that the Court considers TRT's statutory argument on its merits, it should have little difficulty in recognizing that TRT's analysis suffers from circularity and baseless inference. TRT concedes -- as it must -- that Section 222 was enacted in 1943 for "the specific purpose of providing the means to allow Western Union and the Postal Telegraph Company to merge . . . into a monopoly provider of domestic record carrier service which would divest its international operations," (TRT Brief, p. 24, footnote 12). Section 222 of the Act, by its terms, deals only with "consolidations and mergers of telegraph carriers." Clearly, the Telenet and Graphnet applications did not present the Commission with a proposed consolidation or merger, and thus Section 222 is not applicable to their applications. See RCA Global Communications, Inc., 42 FCC2d 774, at 779 (1973).

TRT contends that the Congress, in excluding "gateway" operations by the international carriers from the definition of "domestic telegraph operations" in subparagraph (5) of Section 222(a), intended to impose an absolute prohibition upon international carriers' acceptance or delivery of messages outside of the so-called gateway cities, and that symmetry compels that the definition of "international telegraph operations" contained in subparagraph (6) be read as barring any domestic carrier from offering international services. (TRT Brief, pp. 13-22).

TRT's concept of "symmetry" is faulty: There is nothing symmetrical about the domestic and international telegraph markets. As a result of the 1943 merger of Western Union and Postal Telegraph, a de facto domestic monopoly for public message telegram service was created, but the competitive international telegram market remained competitive, earlier legislative attempts to encourage a merger of the international carriers having been abandoned. Given this non-symmetrical market structure, there is no basis for suggesting that all domestic carriers are barred from any international activities.

An unstated premise of TRT's argument is that Telenet and Graphnet are "domestic telegraph carriers," which (under TRT's "symmetry" argument) would be barred from international telegraph operations. The Commission has not found Telenet and Graphnet to be "domestic telegraph carriers" either in the

Orders here under review, or in their original authorizations, and it cannot be assumed that it would so classify them.^{21/}

See, e.g., American Satellite Corp., supra. Thus, on this additional ground, TRT's logic fails.

TRT's position, moreover, ignores the very purpose of Section 222. That purpose, simply stated, was to permit a merger of two domestic telegraph carriers, one of which was then engaged in international as well as domestic services. To protect the independent international carriers from the merged domestic monopoly (upon which the international carriers were dependent for the acceptance and delivery of their hinterland message traffic), Section 222 (c)(2) required that the merged entity divest itself of its international operations (a divestiture which was nineteen years in the making), and Section 222(e) required that the merged domestic carrier distribute outbound telegram traffic among the international carriers upon the basis of an equitable formula subject to the Commission's approval.

Section 222 did not, in letter or intent, grant Western Union a de jure domestic monopoly for all record services, nor did it grant the international carriers a protected oligopoly as to their record services. As TRT concedes (Brief, p. 12), Section 222 "is less than a model of clarity." That lack of clarity, however, does not permit one to rewrite the law to fit

^{21/} Of course, it is not the function of this Court to undertake such a classification in the first instance, but only to review the Commission's actions. TRT failed to present its arguments to the Commission, and thus it would require this Court to speculate as to how the Commission might have classified Telenet's or Graphnet's domestic activities, in order to reach the statutory arguments of TRT. Section 405 of the Act is clearly designed to foreclose such an imposition upon the Courts.

one's needs of the moment.

Had Congress in 1943 intended to bar other domestic carriers (in addition to the merged domestic entity) from entering the international field, it would have specifically stated so in Section 222. In fact, it did not, and none of the legislative history cited by TRT indicates that the Congress had anything in mind beyond the merger of Western Union and Postal Telegraph, and the protection of the other international carriers from unfair competition at the hands of the merged entity's international arm.^{22/}

CONCLUSION

Upon analysis, no cogent arguments for disturbing the Orders of the Commission have been presented. Confronted with a demonstrated need for improved international communications services, and having before it the proposals of responsible entities which had proven their technical competence domestically, the Commission would have been remiss in discharging its statutory mandate had it refused to authorize Graphnet and Telenet to expand their services internationally.

^{22/} Had the merger not occurred, Western Union could have continued (and presumably expanded) its international operations. Could it then be argued (as TRT does) that no other entity could operate in both domestic and international markets? Obviously not! Thus, the essence of TRT's argument is that new carriers like Telenet are barred not by Section 222 per se, but because Western Union chose to merge with Postal Telegraph.

The all-too-familiar protestations of the established international carriers, whose claims for economic protectionism were totally unsupported with any factual material, could properly have been dismissed by the Commission out of hand. However, the Commission gave meticulous attention to each argument presented, and determined that, by conditioning the authorizations and imposing detailed reporting requirements upon the carriers, the public could receive a badly-needed service at the same time that the Commission was increasing its understanding of the international data communications marketplace.

The Commission's Orders represented the essence of reasoned decision-making, and must be affirmed.

Respectfully submitted,

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August 7, 1978

CERTIFICATE OF SERVICE

I, Edward P. Taptich, a member of the Bar of this Court, do hereby certify that I have served copies of the foregoing "Brief of Intervenor Graphnet Systems, Inc., and Telenet Communications Corporation", by placing copies thereof in the U.S. mail, postage prepaid, this 7th day of August, 1979, addressed to the following persons:

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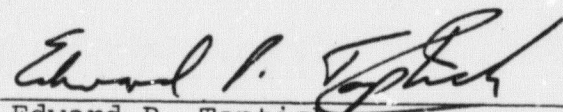
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